

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LEANNA K. STEWART**  
Claimant

VS.

**HALLMARK CARDS, INC.**  
Self-Insured Respondent

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Docket No. 1,013,591

**ORDER**

Respondent requests review of the December 31, 2003 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant suffered accidental injury arising out of and in the course of his employment on March 19, 2003. The ALJ further determined claimant provided timely notice and written claim. The ALJ awarded claimant temporary total disability compensation and medical treatment with Dr. Glenn M. Amundson as well as reimbursement of itemized medical and mileage expenses.

The respondent requests review of the following: (1) whether the claimant met with personal injury arising out of and in the course of employment; (2) whether the claimant gave timely notice within 10 days; (3) whether timely written claim was made; and, (4) whether the ALJ has the authority to order a self-insured respondent to pay temporary total disability during the same time period that the employee received full pay.

Claimant argues the Board does not have jurisdiction to review whether the ALJ erred in ordering payment of temporary total disability compensation. Claimant further requests the Board to affirm the ALJ's Order For Compensation.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The respondent contends claimant has not met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment because

her initial complaint of back pain noted an onset at home on a Sunday morning after she had last worked on Thursday.

Claimant agrees that is what happened. But claimant attributed her onset of back pain to her work activities the week before Sunday when she was running larger than usual stock on the two machines she was responsible for at work. Claimant testified she told the plant nurse on Monday that she was unable to work because of back pain and that she thought her back problem was caused by her work. The plant nurse testified and denied that conversation occurred.

If no further evidence was presented the respondent's position might be more persuasive. However, claimant further testified that after she was off work on FMLA leave following this episode she ultimately returned to full-duty work for respondent. On numerous occasions while performing her regular job duties the claimant told her supervisor as well as the plant nurse that her work activities were causing her back pain to worsen. The plant nurse admitted claimant told her that her work activities were causing her back pain to worsen.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>1</sup> Even if it were presumed the claimant did not meet her burden of proof regarding causation for the initial onset of her back pain, the evidence clearly establishes that as she returned to work performing her regular work duties she continued to aggravate and worsen her back condition. Claimant has met her burden of proof that she suffered accidental injury arising out of and in the course of her employment.

When the claimant filed her claim for compensation she alleged repetitive injuries each and every day worked through March 19, 2003, claimant's last day worked before she underwent back surgery. The ALJ adopted that date as the date of accident and the Board agrees.<sup>2</sup> And respondent admitted it received claimant's written claim on September 17, 2003. Consequently, written claim was timely.<sup>3</sup>

It is uncontroverted that after claimant returned to work following her FMLA leave, she repeatedly told both her supervisor and the plant nurse that performing her regular work duties was causing her back condition to worsen. Accordingly, claimant has met her burden of proof that she gave timely notice of her ongoing repetitive accidents.

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<sup>1</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

<sup>2</sup> See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

<sup>3</sup> See K.S.A. 44-520a(a) (Furse 2000).

Lastly respondent argues the ALJ erred in awarding claimant temporary total disability benefits. Respondent argues claimant was not entitled to temporary total disability compensation because during some of the dates she was off work she continued to receive her full wages. Conversely, claimant argues the Board does not have jurisdiction to review this issue on appeal from a preliminary order.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>4</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) (Furse 2000) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>5</sup>

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2) (Furse 2000). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>6</sup>

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Avery did not exceed his jurisdiction. Whether claimant's receipt of salary continuation payments while off work prevents claimant from receiving temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order.

Accordingly, the Board concludes that it does not have jurisdiction at this juncture of the proceedings to review whether the ALJ erred in awarding claimant temporary total disability compensation.

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<sup>4</sup> K.S.A. 2002 Supp. 44-551.

<sup>5</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>6</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

**WHEREFORE**, it is the finding of the Board that the Order For Compensation of Administrative Law Judge Brad E. Avery dated December 31, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this 27th day of February 2004.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director